IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
vs.	:	NO. 261 CR 1996
THOMAS LIPANI,	:	
Defendant	:	

Criminal Law – PCRA - Mandatory Minimum Sentence - Challenge to Legality of Sentence under Alleyne - Timeliness of PCRA Petition - Application of a New Rule of Constitutional Law to Final Judgments of Sentence – Requirement of Retroactivity

1. In Alleyne, the United States Supreme Court held that "any fact which, by law, increases the mandatory minimum sentence for a crime must be: (1) treated as an element of the offense, as opposed to a sentencing factor; (2) submitted to the jury; and (3) found beyond a reasonable doubt." As a direct result of this holding, sentencing statues in Pennsylvania which require the imposition of a mandatory minimum sentence predicated upon an operative fact judicially determined by the sentencing court at the time of sentencing by a preponderance of the evidence are unconstitutional and invalid.

2. A sentence imposed in violation of Alleyne is an illegal sentence subject to challenge on direct appeal notwithstanding the failure to raise and/or preserve the issue before the sentencing court.

3. Following Defendant's convictions for rape and involuntary deviate sexual intercourse, Defendant was sentenced to multiple mandatory minimum periods of imprisonment of five to ten years pursuant to 42 Pa.C.S.A. § 9718(a)(1) which required mandatory minimum sentences of not less than five years when the victim was less than sixteen years of age. Almost seventeen years after his judgment of sentence became final following denial of his claims on direct appeal and more than five years after Alleyne was decided, Defendant filed a petition under the Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 (the "PCRA") challenging the legality of his sentences on the basis of Alleyne.

4. The PCRA requires the filing of a PCRA petition within one year of the date the judgment of sentence becomes final, with three exceptions, provided further, that if an exception is invoked, a petition must be filed within sixty days of the date the claim could have been presented. The requirement that the petition be timely filed is jurisdictional such that

the merits of an untimely petition cannot be considered by the reviewing court.

5. The exception to the one-year time limitation relied upon by Defendant under Section 9545(b)(1)(iii) of the PCRA requires, *inter alia*, the recognition of a constitutional right by the United States Supreme Court more than one year after the judgment of sentence became final, which right is held by the Supreme Court to apply retroactively. The constitutional right upon which Defendant bases his claim to the exception is that announced in Alleyne.

6. The PCRA petition filed by Defendant which is the subject of these proceedings was filed on January 28, 2019, more than sixty days after the United States Supreme Court's decision in Alleyne on June 17, 2013. Under the PCRA's jurisdictional time-bar, the petition is untimely and cannot be considered.

7. For the exception to the PCRA's one-year time-bar to provide relief in a case in which the judgment of sentence became final more than one year before the Supreme Court recognized the constitutional right at issue, the Court must also hold that the right applies retroactively. If the judgment of sentence is not final at the time the constitutional right is first recognized, there is no issue of retroactivity either on direct or collateral review.

8. The standard for determining whether a new constitutional rule applies retroactively to judgments of sentence which became final before the new rule was announced is that set forth by the United States Supreme Court in Teague v. Lane: the decision must effect a substantive rule which places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or the rule must be a procedural one which impacts "bedrock procedural elements essential to the fairness of a proceeding." Under Teague, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced.

9. The holding in Alleyne set forth a new constitutional procedural rule; it did not announce either a new substantive or "watershed" procedural rule under Teague, and has never been held by the United States Supreme Court or the Pennsylvania Supreme Court to apply retroactively to cases in which the judgment of sentence had become final. Because Defendant's judgment of sentence was final before Alleyne was decided and Alleyne does not apply retroactively, Alleyne provides no legal basis to invalidate Defendant's mandatory minimum sentences.

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	:	
vs.	:	NO. 261 CR 1996
	:	
THOMAS LIPANI,	:	
Defendant	:	

Jean A. Engler, Esquire — Counsel for Commonwealth
Thomas Lipani — Pro se

MEMORANDUM OPINION

Nanovic, P.J., August 2, 2019

At issue in this case is what relief, if any, a criminal defendant is entitled to when raising a constitutional challenge to the legality of his sentence premised on the United States Supreme Court's decision in Alleyne v. United States, decided after the defendant's judgment of sentence became final, in an untimely PCRA petition.

PROCEDURAL AND FACTUAL BACKGROUND

Twenty years ago, on October 7, 1998, the above-named defendant, Thomas Lipani, was convicted, *inter alia*, of repeated acts of Rape[1] and Involuntary Deviate Sexual Intercourse[2] of two young sisters during a four-year period, between 1987 and 1991, inclusive. At the time, Defendant was in his forties and both

[1] 18 Pa.C.S.A. § 3121(1), (2) and (4) (Act of December 21, 1984, P.L. 1210, No. 230, §1, effective February 19, 1984, amended March 31, 1995).
[2] 18 Pa.C.S.A. § 3123(1), (2), (4) and (5) (Act of December 6, 1972, P.L. 1482, No. 334, §1, effective June 6, 1973, amended March 31, 1995). Subsection (5) of the 1972 Act contained as an element of the offense that the victim was less than sixteen years of age.

sisters were less than sixteen years of age (*i.e.*, DOB 11/28/79 and 10/28/85).

Defendant was sentenced on April 22, 1999 by the Honorable Richard W. Webb, who presided at Defendant's jury trial, to an aggregate sentence of no less than nineteen nor more than thirty-eight years' incarceration in a state correctional institution. This sentence included multiple mandatory minimum sentences of five to ten years - some consecutive, others concurrent to one another - pursuant to the then current version 42 Pa.C.S.A. § 9718(a)(1) for Defendant's convictions of rape and involuntary deviate sexual intercourse.[3] Defendant's

[3] At the time Defendant was sentenced, Section 9718(a)(1) required that an individual convicted of rape or involuntary deviate sexual intercourse of a victim less than sixteen years of age be sentenced to a mandatory minimum term of imprisonment for the offense of not less than five years. 42 Pa.C.S.A. § 9718(a)(1). The statute as it then existed provided in its entirety as follows:

> § 9718. Sentences for offenses against infant persons
>
> (a) Mandatory sentence.--
>
> (1) A person convicted of the following offenses when the victim is less than 16 years of age shall be sentenced to a mandatory term of imprisonment as follows:
>
> 18 Pa.C.S. § 2702(a)(1) and (4) (relating to aggravated assault)--not less than two years.
>
> 18 Pa.C.S. § 3121(a)(1), (2), (3), (4), (5), and (6) (relating to rape)--not less than five years.
>
> 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse)--not less than five years.
>
> (2) A person convicted of the following offenses when the victim is less than 13 years of age shall be sentenced to a mandatory term of imprisonment as follows:

aggregate sentence also included time for other offenses of which he was convicted, not relevant to these proceedings.

On direct appeal, Defendant's convictions were affirmed by the Pennsylvania Superior Court on May 15, 2000. Defendant's request for allowance of appeal was denied by the Pennsylvania Supreme Court on November 14, 2000. No further direct review was sought such that Defendant's judgment of sentence became final ninety days later, that is, on February 12, 2001. *See* 42 Pa.C.S.A. § 9545(b)(3); U.S.Sp.Ct. Rule 13 (allowing ninety days to file a petition for certiorari).

Since February 12, 2001, Defendant has filed five separate petitions for collateral relief pursuant to the Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 (the "PCRA"): on November 2, 2001, March 27, 2009, February 4, 2010, December 1, 2016, and the instant *pro se* petition filed on January 28, 2019. All four of Defendant's previously filed PCRA petitions were denied.

Counsel was appointed for Defendant's first PCRA petition which was denied by Judge Webb on July 3, 2002; this denial was affirmed by the Pennsylvania Superior Court on September 16,

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> 18 Pa.C.S. § 2702(a)(1) (relating to aggravated assault)--not less than five years.
>
> 18 Pa.C.S. § 3125(1) through (6) (relating to aggravated indecent assault)--not less than two and one-half years.
>
> (b) Eligibility for parole.--Parole shall not be granted until the minimum term of imprisonment has been served.

42 Pa.C.S.A. § 9718 (Act of March 31, 1995, P.L. 985, No. 10 (Spec. Sess. No. 1), § 17, effective in sixty days).

2003; and Defendant's petition for allowance of appeal was denied by the Pennsylvania Supreme Court on January 18, 2005. In Defendant's petition filed on December 1, 2016, Defendant claimed his sentence was illegal under the United States Supreme Court's decision in Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). By order dated July 11, 2017, this petition was denied and dismissed without hearing. The notice of intent to dismiss which preceded this order, to which Defendant filed no response, explicitly referenced the decisions in Alleyne and Commonwealth v. Wolfe, 140 A.3d 651 (Pa. 2016).

In Defendant's current PCRA Petition now before us, Defendant again claims his sentence is illegal under Alleyne and Wolfe, contending that the imposition of a mandatory minimum sentence under Section 9718(a)(1) for his convictions of rape and involuntary deviate sexual intercourse when the victim was under sixteen years of age was unconstitutional, and that he is entitled to be resentenced. On March 8, 2019, we issued notice of our intent to deny and dismiss the petition without hearing and set forth a detailed explanation of our reasons for doing so. Defendant filed a response opposing the denial and dismissal of his petition. By order dated May 1, 2019, Defendant's petition for post-conviction collateral relief filed on January 28, 2019 was denied and dismissed.

On June 3, 2019, Defendant appealed the May 1, 2019 order. *See* Kittrell v. Watson, 88 A.3d 1091, 1096 (Pa.Cmwlth. 2014) ("Under the prisoner mailbox rule, a prisoner's *pro se* appeal is deemed filed at the time it is given to prison officials or put in the prison mailbox."). In response to our order dated June 4, 2019 requesting Defendant to provide a concise statement of the issues he intends to raise on appeal, Defendant's Concise Statement was filed on July 1, 2019.

DISCUSSION

Defendant is not entitled to PCRA relief for two basic reasons: (1) his PCRA petition is untimely; and (2) the holding in Alleyne, upon which Defendant fundamentally relies for his request to be resentenced, is not retroactive.

The United States Supreme Court decided Alleyne on June 17, 2013. In Alleyne, the Court held that "any fact which, by law, increases the mandatory minimum sentence for a crime must be: (1) treated as an element of the offense, as opposed to a sentencing factor; (2) submitted to the jury; and (3) found beyond a reasonable doubt." Commonwealth v. DiMatteo, 177 A.3d 182, 184 (Pa. 2018). In Commonwealth v. Hopkins, 117 A.3d 247, 259-60 (Pa. 2015) and Wolfe, 140 A.3d at 660-61, the Pennsylvania Supreme Court with specific reference to Alleyne clearly and unequivocally held that sentencing statutes in Pennsylvania which require the imposition of a mandatory minimum

sentence predicated upon an operative fact judicially determined by the sentencing court at the time of sentencing by a preponderance of the evidence are unconstitutional, non-severable, and void.[4]

Timeliness of Petition

Whether Alleyne or Wolfe is used as the starting point for calculating the timeliness of Defendant's petition, it is untimely. The PCRA requires the filing of a PCRA petition within one year of the date the judgment of sentence becomes final, with three exceptions: (1) unconstitutional interference by government officials; (2) newly discovered facts that could not have been previously ascertained with due diligence; or (3) a newly recognized constitutional right that has been held to apply retroactively. 42 Pa.C.S.A. § 9545(b). The requirement that the petition be timely filed is jurisdictional such that the merits of an untimely petition cannot be considered by the reviewing court. *See* Commonwealth v. Lewis, 63 A.3d 1274, 1280-

[4] Significantly, the current statutory commands that the provisions of Section 9718 are not an element of the crime; that notice of the provisions is not required to be given to the defendant prior to conviction, but that reasonable notice of the Commonwealth's intention to proceed under this Section is required to be provided after conviction and before sentencing; and that the applicability of this Section is to be determined by the court at sentencing by a preponderance of the evidence, were not contained in the language of Section 9718 as it existed at the time of Defendant's sentencing. *See supra* note 3. This language did not appear until the Act of November 29, 2006, P.L. 1567, No. 178, §4, effective January 1, 2007, adding Subsections (c) to (e) to Section 9718. Further, for Defendant to be convicted of involuntary deviate sexual intercourse under then existing Section 3123(5) of the Crimes Code, it was necessary for the jury to find that the victims were less than sixteen years of age. *See supra* note 2. Therefore, the statutory defects ruled unconstitutional in Alleyne are not present in the instant matter.

81 (Pa.Super. 2013) ("The PCRA's time restrictions are jurisdictional in nature. Thus, if a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims.").

Defendant's judgment of sentence became final on February 12, 2001; the one-year period to file a PCRA petition, assuming no applicable exception permitting an extension, ended on February 12, 2002; Defendant's petition was filed on January 28, 2019, almost seventeen years beyond this date. To bridge this gap, Defendant relies upon the exception for a newly recognized constitutional right, that

> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(iii). A petition invoking this exception must "be filed within sixty days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2).[5]

[5] Section 9545(b)(2) was amended effective December 24, 2018, to increase the period for filing a petition invoking one of the three enumerated exceptions to the one-year time-bar from sixty days to one year. Section 3 of the Amending Act of 2018, October 24, P.L. 894, No. 146, provides that the amendment to Section 9545(b)(2) shall apply to claims arising on December 24, 2017, or thereafter. Defendant's claim, as discussed above, arose prior to December 24, 2017, and is therefore governed by the sixty-day period for filing a petition invoking an exception which was then in effect.

As is apparent from the timeline previously set forth in this opinion, Defendant's petition filed on January 28, 2019, was not filed within sixty days of Alleyne, decided June 17, 2013, or Wolfe, decided June 20, 2016. It is untimely.[6]

Retroactivity of Alleyne

While not apparent from the face of the exception relied on by Defendant, equally true and equally fatal to Defendant's claim, in neither Alleyne nor in Wolfe did the United States Supreme Court or the Pennsylvania Supreme Court, respectively, hold that Alleyne should be applied retroactively to cases in which the judgment of sentence had become final, a requirement of the Section 9545(b)(1)(iii) exception.

In Commonwealth v. DiMatteo, 177 A.3d 182 (Pa. 2018), the Pennsylvania Supreme Court stated:

> The appropriate framework under which courts consider retroactive application of new constitutional rules to final judgments of sentence is derived from the United States Supreme Court plurality opinion in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Under Teague, retroactive application of new rules of constitutional law is afforded to two classes of rules: substantive rules, *i.e.*, rules that place "certain kinds of primary, private individual conduct beyond the power of

[6] Moreover, the issue has been waived. As noted in the factual recitation for this opinion, the same issue was raised by Defendant in his fourth PCRA petition filed on December 1, 2016. Section 9544(b) of the PCRA, 42 Pa.C.S.A. § 9544(b) expressly states that "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." Both Alleyne and Wolfe were decided before Defendant's fourth PCRA petition was filed.

> the criminal law-making authority to proscribe[;]" and certain procedural rules which are "implicit in the concept of ordered liberty[,]" otherwise referred to as "watershed rules of criminal procedure." Teague, 489 U.S. at 311, 109 S.Ct. 1060.

177 A.3d at 188-89. *See also* Commonwealth v. Bracey, 986 A.2d 128, 143-44 (Pa. 2009) ("Teague is acknowledged as setting forth the legal framework for a principled approach to deciding when a pronouncement of law should be given effect to cases pending on collateral review.").

Pursuant to the decision in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), a defendant is entitled to application of a new rule of federal constitutional law on collateral review if, at the time the rule is announced, his or her judgment of sentence is not yet final. For a new rule to apply to those cases where the judgment of sentence was final before the new rule was announced, the rule must meet the Teague test to be retroactive (*i.e.*, it is a substantive or "watershed" rule of criminal procedure).

In Commonwealth v. Washington, 142 A.3d 810 (Pa. 2016), the Pennsylvania Supreme Court accepted the Teague standard as "[t]he appropriate framework under which courts consider retroactive application of new constitutional rules to final judgments of sentence," further observing that under this standard "a new rule of constitutional law is generally

retrospectively applicable only to cases pending on direct appellate review." DiMatteo, 177 A.3d at 188; Washington, 142 A.3d at 813, 819. "Under Teague, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced." Montgomery v. Louisiana, ___ U.S. ___, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016).[7] With specific reference to Alleyne, the Court in Washington determined that the pronouncement made in Alleyne was neither a substantive nor a "watershed" rule under Teague – acknowledging at the same time that Alleyne did announce a "new constitutional procedural rule" – and held that Alleyne does not apply retroactively. 142 A.3d at 818-19.[8]

[7] "[W]here a petitioner currently serving a mandatory minimum sentence has filed a timely PCRA petition and his judgment of sentence was not final at the time Alleyne was decided, his sentence is illegal and he is entitled to a new sentence." Commonwealth v. DiMatteo, 177 A.3d 182, 185 (Pa. 2018). A new rule of law does not, however, "automatically render final, pre-existing sentences illegal. A finding of illegality, concerning such sentences, may be premised on such a rule only to the degree that the new rule applies retrospectively. In other words, if the rule simply does not pertain to a particular conviction or sentence, it cannot operate to render that conviction or sentence illegal." Commonwealth v. Washington, 142 A.3d 810, 814 (Pa. 2016). Because the holding in Alleyne is not retroactive, the mandatory minimum sentences Defendant received were not illegal nor is Defendant entitled to the benefit of legality-of-sentence claims for purposes of the issue preservation doctrine. *Cf.* Commonwealth v. Dickson, 918 A.2d 95, 99 (Pa. 2007) ("[I]f the sentence clearly implicates the legality of sentence, whether it was properly preserved below is of no moment, as a challenge to the legality of sentence cannot be waived.").

[8] A procedural rule is one that regulates only the *manner of determining* a defendant's culpability, Washington, 142 A.3d at 813 (citation and quotation marks omitted), the subject of Alleyne, concerning as it does a defendant's Sixth Amendment right to a jury trial and to proof beyond a reasonable doubt. A substantive rule is one which "decriminalize[s] conduct or prohibit[s] punishment against a class of persons." Washington, 142 A.3d at 813. To meet the standard of being a "watershed rule" of criminal procedure, the rule must impact "bedrock procedural elements essential to the fairness of a proceeding," not simply relate to due process, with only one rule to date having met this standard, that to the right to counsel conferred upon

Therefore, consistent with the Teague test of retroactivity, "Alleyne does not apply to cases where the judgment of sentence was final prior to Alleyne, because if the judgment of sentence was not final, then its application is not truly 'retroactive.'" DiMatteo, 177 A.3d at 192.

Under Teague, which accepted the basic premise expressed by Justice Harlan in Mackey v. U.S., 401 U.S. 667, 682-83, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring and dissenting), that it is "sounder" generally "to apply the law prevailing at the time a conviction became final than it is to seek to dispose of cases on the basis of intervening changes in constitutional interpretations" when applying a new rule of law in a collateral proceeding, and which balanced the need for finality in criminal cases with the need for ensuring that criminal punishment is imposed only when authorized by law, Alleyne is inapplicable to those defendants whose judgments of sentence were final before June 17, 2013. DiMatteo, 177 A.3d at 191-92; Washington, 142 A.3d at 819. Accordingly, Defendant's judgment of sentence which became final on February 12, 2001, more than twelve years before Alleyne was decided, was neither illegal when imposed or now.

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indigent defendants charged with felonies as recognized in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Washington, 142 A.3d at 817.

CONCLUSION

A defendant is not entitled to have a mandatory minimum sentence invalidated under Alleyne where the PCRA petition is untimely. *See generally* Commonwealth v. Fahy, 737 A.2d 214, 223 (Pa. 1999) (determining that even challenges to illegal sentences are subject to the PCRA's time limitations). Nor is a defendant entitled to have a mandatory minimum sentence invalidated under Alleyne on a timely filed PCRA petition where the judgment of sentence became final before Alleyne was decided. DiMatteo, 177 A.3d at 191-192. Here, because Defendant's judgment of sentence was final before Alleyne was decided and because his Petition for Post-Conviction Relief was untimely, he is entitled to no relief.

BY THE COURT:

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P.J.